C. P. ANSELL v. REGINA.

[App. Crim. Juris. (Spenser Wilkinson, J.) June 6, 1952]

[Penang — Criminal Appeal No. 14 of 1952]

Criminal Procedure Code (Cap. 21), s. 5 — Penal Code, ss. 415, 417 and 420 — Cheating — Sentence — Taking other offences into consideration.

The appellant was convicted upon two charges of cheating under section 420 of the Penal Code. He was sentenced to one month's rigorous imprisonment on the first charge and eight months' rigorous imprisonment on the second charge. In sentencing him on the second charge the President of the Sessions Court at the request of the appellant took into consideration four other offences of cheating. In an appeal against the sentence on the second charge:—

Held, that (1) the English practice of taking into consideration in passing sentence other offences admitted to have been committed by the accused but in respect of which there has been neither plea nor conviction cannot be imported into the criminal procedure of the Subordinate Courts under section 5 of the Criminal Procedure Code; (2) offences of cheating should normally be charged under section 415 of the Penal Code, punishable under section 417, section 420 being reserved for serious cases only. **Dictum** in **Rex v. Nadaison**(3) approved.

Semble: Taking other offences into consideration is a matter of jurisdiction and such jurisdiction has not been conferred upon Sessions Courts by the Courts Ordinance, 1948.

Cases referred to :—

(1) *Rex v. Marquis* 35 Cr. App. R. 33.

(2) *Rex v. Lam Heng* (1937) M.L.J. 154 at 155 (1937) S.S.L.R. 96 at 97.

(3) *Rex v. Nadaison* (1933) M.L.J. 41; (1933) S.S.L.R. 279.

APPEAL from Penang Sessions Court.

Appellant in person.

C. M. Sheridan (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Spenser Wilkinson, J. : — The appellant was charged with two offences of cheating under section 420 of the Penal Code. He pleaded guilty to both charges and was sentenced to one month's rigorous imprisonment on the first charge and to eight months' rigorous imprisonment on the second charge, the sentences to run consecutively. This appeal was against the sentence on the second charge.

Upon conviction the appellant asked the President of the Sessions Court to take into consideration four other similar offences committed by him at about the same period, and this was done. The learned President in his Grounds of Decision expressed the view that the proper sentence on the second charge was three months' rigorous imprisonment but taking into consideration the four other offences he added a further five months' rigorous imprisonment, making a total sentence on the second charge of eight months' rigorous imprisonment.

The first question which arose was whether the Subordinate Courts in this country have power, when sentencing a person convicted of an offence, to take into consideration other offences which are admitted by the accused but in respect of which there has been no plea and no conviction. Before dealing with this important and difficult question I must observe that in any event I do not think the method adopted in the present case by the learned President can be supported. It is one thing to say "Taking into consideration the record and character of the accused and certain other offences which he wishes to be considered I impose eight months' rigorous imprisonment". It is quite another thing to do what was done in this case — i.e. to say that three months was the correct sentence for the offence and then to add a further term of five months in respect of other offences. What the learned President in effect did was to sentence the accused to five months' rigorous imprisonment in respect of offences with which he was never charged.

Dealing now with the main question, although I have never heard of it being done in this country I think there is no doubt that the High Court would have jurisdiction to take other offences into consideration in the manner set out in *Archbold's Criminal Pleadings*, 32nd edition, page 212. I think this jurisdiction is conferred by paragraph 1 of Part A of the First Schedule to the Courts Ordinance, 1948, which reads as follows :—

"1. Jurisdiction within the Federation of a like nature and extent as that held and exercised in England in criminal matters by the High Court of Justice."

It does not follow, however, because the High Court has jurisdiction that the Subordinate Courts also have it. The criminal jurisdiction of the Sessions Court is set out in section 63 of the Courts Ordinance, 1948 as follows :—

"63. A Sessions Court shall have jurisdiction to try all offences for which the maximum term of imprisonment provided by law does not exceed seven years' imprisonment of either description or which are punishable with fine only and offences under sections 409, 454 and 457 of the Penal Code....."

Section 61 of the same Ordinance confers certain powers, duties and functions upon Presidents of Sessions Courts, but in my opinion this does not affect jurisdiction. A distinction between "jurisdiction" and

"powers" is drawn in sub-section (2) of section 8 of the Criminal Procedure Code thus :—

"(2) Every District Court shall have in the exercise of its jurisdiction all the powers which belong to and are exercisable by a Police Court."

I am of the opinion that the powers conferred by section 61 of the Courts Ordinance, 1948 are powers ancillary to the exercise of the Courts' jurisdiction. The only jurisdiction is that conferred by section 63 to *try* offences. Under section 3 of the Criminal Procedure Code, those offences must be tried in all respects in accordance with the provisions of the Code, and in my view taking offences into consideration is not trying them.

I am inclined to the view that this matter is one of jurisdiction and not merely procedure. When an offender has previous convictions or is of bad character this usually precludes him from having the advantage of the mitigation usually accorded to first offenders. The result is that the sentence is not likely to be as light when there are previous convictions as when there are none; and if the same result is to ensue from the existence of "other offences" it follows that at least some part of the sentence is referrable to offences in respect of which the accused is deemed by law to be innocent unless and until he has been convicted of them. It seems to me, therefore, that in taking other offences into consideration a Court here is in effect assuming jurisdiction to try offences which are not properly before it. As, however, this aspect of the matter was not very fully argued before me I will assume, for the purpose of this judgment, that in England it is a matter of practice rather than of jurisdiction to take other offences into consideration.

If it is a matter of procedure then the question arises whether section 5 of the Criminal Procedure Code would apply. This section reads as follows :—

"5. As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force in the Colony the law relating to criminal procedure for the time being in force in England shall be applied so far as the same does not conflict or is not inconsistent with this Code and can be made auxiliary thereto."

I attach considerable importance to the words "so far as the same does not conflict or is not inconsistent with this Code". The Criminal Procedure Code has very detailed provisions as to the framing of charges, trying of charges together and the joinder of persons in one trial. Section 173 in particular lays down that, except in the cases mentioned in sections 174, 175, 176 and 179, for every distinct offence of which every person is accused there shall be a separate charge and every such charge shall be tried separately. Without going into the numerous sections which might affect the point it appears to me that the English practice is inconsistent with the mandatory provisions of section 173 and therefore cannot be adopted under section 5.

In the recent case of *Rex v. Marquis*[1] there is a passage in the judgment of the Court of Criminal Appeal which is relevant to the question now under discussion. In that case the Lord Chief Justice said :—

".....taking of cases into consideration is only what I may call a convention. It has been a device that has been put into force by the Judges now for a great many years with a view to preventing a prisoner who has served his sentence from being arrested on the other charges immediately he comes out of prison."

What it is in the English procedure which makes it possible for a prisoner who has served his sentence to be arrested on other charges immediately he comes out of prison I do not pretend to know. I am of opinion, however, that under our Criminal Procedure Code there is no reason why all offences known to have been committed by an accused person should not be dealt with immediately one after the other (or in appropriate circumstances three at a time) and I cannot help feeling that the Courts here would look with extreme disfavour on a prosecution commenced after a man had served his sentence in respect of an offence of which the Police had information before his sentence began. However this may be, it seems clear that the English method is no more than a "convention" or "device" and I cannot think it right to import into this country under section 5 of the Criminal Procedure Code as "part of the law of criminal procedure" in England something which the Court of Criminal Appeal has called a convention or device.

It is true that the Criminal Procedure Code is not entirely exhaustive (see *Rex v. Lam Heng*[2]) and that the general principles upon which sentences are assessed in our Courts are the principles laid down in the English Courts. On this subject the Code is silent. But taking other offences into consideration stands on a different footing, both on account of its inconsistency with the provisions of our Code and also on account of its being a device rather than part of the English law of criminal procedure. I was, therefore, of opinion that the practice could not be imported into the Subordinate Courts of the Federation under section 5 of the Criminal Procedure Code. From this it followed that the additional five months' rigorous imprisonment imposed by the learned President could not stand.

Having eliminated the five months' additional imprisonment imposed in respect of the second charge in this case there remained the sentence of three months

which in the opinion of the learned President was the correct sentence on this charge. The appellant argued that, in all the circumstances, even this sentence was excessive. The appellant did not have the assistance of Counsel but I understood his main argument to be that one of the matters which the learned President had not taken into consideration at all was the appellant's intention of making restitution to the persons whom he had cheated. He also pointed out that there was a slight conflict between the facts as stated by the Police after his plea of guilty and his own version of what had happened. On page 8 of the record the following passage appears in the statement made by the prosecution :—

"Accused was asked for his address and where he worked; he gave the address on these bills, Ex. P. 5."

In his own statement to the Court, however, the accused said that at Pritchards he was asked to put his name and address on the paper, but was not asked for his employment.

I did not think there was much substance in the latter point, because later in the case the appellant admitted that he had omitted to tell the Manager that he had no employment, knowing that he would not have got credit had he done so; but it appeared to me that the learned President did not perhaps pay as much attention as he might have done to the arrangements the accused had made for repaying the amounts of the credits obtained by him. I thought it was probably true, as the appellant suggested, that, being unrepresented, he did not put this point as strongly as he might have done before the Court and that it was to some extent overlooked.

There is another point bearing upon the question of sentence in this case. In *Rex v. Nadaison*[3] Terrell, J., expressed the view that in section 420 of the Penal Code "property" should be regarded as *ejusdem generis* with "valuable security" and that in any case section 420 should be reserved for serious cases only and that normally these offences should be charged under section 415, punishable under section 417. With this view I respectfully agree. Under section 417 the maximum punishment is one year whereas under section 420 it is seven years. Had the appellant in this case been charged under sections 415 and 417 it is quite possible that the learned President might have assessed the punishment on a lower standard altogether.

I did not think it could be suggested that a sentence of three months' rigorous imprisonment was in itself either illegal or excessive, but I thought it possible that had the question of restitution been brought more clearly before the mind of the learned President and had the charge been under section 417 he might have made the sentences on the two charges concurrent instead of consecutive. For these reasons I gave the appellant the benefit of this doubt and amended the sentence imposed by the learned President to one of three months' rigorous imprisonment to run concurrently with the one month's rigorous imprisonment imposed in respect of the first charge.

Order accordingly.

THE FIRESTONE TIRE & RUBBER CO. (S.S.) LTD. v. SINGAPORE HARBOUR BOARD.

[Privy Council (Lord Normand, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen)
June 10, 1952]

[Privy Council Appeal No. 8 of 1951]

Public Authorities Protection — Limitation of action — Singapore Harbour Board acting as Warehousemen — Short delivery from godown — Acting for benefit of public within statutory powers — Public Authorities Protection Ordinance (Cap. 14) as amended by Ordinance No. 19 of 1939, s. 2(1)(2) — Singapore Ports Ordinance (Cap. 149).

This was an appeal to the Judicial Committee of the Privy Council from an order of the Court of Appeal of Singapore (Murray Aynsley, C.J., and Gordon-Smith, J., Evans, J. dissenting), reported (1950) M.L.J. 131, allowing the appeal of the Singapore Harbour Board against the judgment of Brown, J., reported in (1950) M.L.J. 47.

The appellants claimed damages for breach of contract of bailment. They said that they were the consignees of a cargo of 3960 loose rubber tyres which arrived in Singapore on the 4th day of July 1946 from Bombay. They alleged that the respondent Board received the full number of tyres into their godown but delivered to the appellants 17 tyres short. The appellants on the 1st August 1946 notified the respondent Board of the loss of 17 tyres and on the 19th June 1948 the Writ was issued.

The respondent Board who are a statutory body incorporated by the Ports Ordinance (Cap. 149) contended that under the Ordinance they have powers to manage the Singapore harbour and carry on the business of warehousemen and as the action against them was for an act done in pursuance of the Ports Ordinance and it was not maintainable because it was not commenced within six months after the alleged act, neglect or default complaint of as required by section 2 of the Public Authorities Protection Ordinance. Brown, J., held that the respondent Board had not discharged their burden of proving that the loss of the tyres was not due to any fault of theirs and the respondent Board could not claim the protection of the Public Authorities Protection Ordinance as they were dealing with the appellants as individuals in the course of an implied contract, which was an incident in carrying on their business as warehousemen. The Court of Appeal in allowing the appeal held that the Board were directly performing their duties as dock owners under the Ports Ordinance and were entitled to protection under the Public Authorities Protection Ordinance.